DATO' DING LIAN CHEON

v.

YAP YOU JEE & ORS

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-156-96]
26 MAY 1999

CIVIL PROCEDURE: *Stay of proceedings - Concurrent civil and criminal proceedings in respect of same subject matter - Whether civil proceedings ought to be stayed pending completion of criminal proceedings - Proper approach - Whether disclosure of defence in civil proceedings would lead to potential miscarriage of justice in criminal proceedings*

The plaintiff, alleging that he had been cheated of his money by the defendants, lodged a police report as a result of which the defendants were charged in the Sessions Court. The plaintiff then commenced a civil action against the defendants to recover his money after which he filed this application to stay the civil proceedings pending the completion of the criminal proceedings. The criminal proceedings had reached the stage of the prosecution having closed its case at the time of hearing this application for stay.

Held:

[1] In deciding whether a stay of civil proceedings should be granted until conclusion of criminal proceedings where there are concurrent civil and criminal proceedings in respect of the same subject matter, the court having control of the civil proceedings could, in the exercise of its discretion, stay those proceedings if it appears to the court that justice so requires having regard to the defendant's right of silence in relation to the concurrent criminal proceedings. An important factor to be taken into account by the court in deciding whether to grant a stay is whether there was a real and not merely a notional damage that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings.

[2] There was no miscarriage of justice nor prejudice occasioned on the defendant by the court granting the stay of the civil proceedings. The documents produced during the criminal trial must be made available during the hearing of the civil suit and the plaintiff certainly cannot produce those documents while the criminal trial was in progress.

[Stay of proceedings granted.]

Case(s) referred to:

Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97 ***(refd)***
Birendra Lal Bhaduri [1904] 32 Cal 22 ***(refd)***
Director of Public Prosecutions v. Humphrys [1976] 2 All ER 497 ***(refd)***
Hemraj [1910] 11 Cr LJ 295 ***(refd)***
Hunter v. Chief Constable of West Midlands & Anor [1981] 3 All ER 727 ***(refd)***
Jefferson Ltd v. Bhetcha [1979] 2 All ER 1108 ***(refd)***
KM Nathersahib & Anor v. Meyer Brothers [1940] 9 MLJ (SSR) 252 ***(refd)***
Kuldip Singh [1954] Pun 691 ***(refd)***
Lister & Co v. Stubbs [1890] 45 Ch D 1 ***(refd)***
Long Samat & Ors v. PP [1974] 2 MLJ 153 ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 2 MLJ 116 ***(refd)***
PP v. Thall Gangadharadu [1956] Andh WR 805 ***(refd)***
Prince Abdul Rahman v. Abu Taha [1980] 3 All ER 409 ***(refd)***
Ram Ranjay Roy v. Emperor ILR 42 Cal 422 ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 ***(refd)***
Robinson v. Pickering [1881] 16 ChD 660 ***(refd)***
Smith & Anor v. Selwyn [1914-1915] All ER Rep 229 ***(refd)***
Solomon Ezekiel & Anor v. Emperor [1939] AIR (Calcutta) 376 ***(refd)***
The PP v. K Bhimeswara Rao [1948] AIR Madras 258 ***(refd)***
Tulsi Ram & Ors v. The State of Uttar Pradesh [1963] AIR Vol 50 All 666 ***(refd)***
Wonder Heat Pty Ltd v. Bishop [1960] VR 489 ***(refd)***
Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 260 ***(refd)***

Legislation referred to:

Court of Judicature Act 1964, para 6 schedule
Criminal Procedure Code, s. 418A
Federal Constitution, art. 145(3)
Penal Code, ss. 34, 109, 415, 417, 420

Offences Against the Person Act 1861 [UK], s. 22
Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 41

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 37, para 443

For the plaintiff - Tan Hock Guan; M/s Tan Hock Chuan & Co
For the 1st defendant - Selvi Sandrasegaram; M/s Gooi & Azura
For the 3rd defendant - RK Menon; M/s RK Menon & Co

Reported by Izzaty Izzudin

JUDGMENT

Abdul Malik Ishak J:

This was an application by the plaintiff in encl. 77 for a stay of Johor Bahru High Court civil suit no: 22-156-1996 pending the completion of Johor Bahru Sessions Court arrest cases – bearing numbers 62-20, 21 and 22 of 1996. Enclosure 77 was supported by the affidavit of the plaintiff himself one Dato' Ding Lian Cheon as seen in encl. 76 and that affidavit was affirmed on 27 November 1997 and filed on 8 December 1997. The first defendant by the name of Yap You Jee and the third defendant by the name of Haji Johari bin Mansor resisted and challenged the plaintiff's application in encl. 77. In so far as the second defendant – Md Jhomi bin Md Supian, was concerned, the plaintiff had procedurally and successfully obtained judgment in default of appearance on 30 September 1996 and so the plaintiff had only to reckon with the first and third defendants in so far as encl. 77 was concerned.

I repeat, encl. 77 was supported by an affidavit of the plaintiff in encl. 76 that was affirmed on 27 November 1997 and filed on 8 December 1997. The third defendant affirmed an affidavit in reply in encl. 80 on 26 January 1998 which was filed on the same date and this was in reply to encl. 76. The plaintiff responded by affirming an affidavit on 13 February 1998 as seen in encl. 84 and the same affidavit was filed on 19 February 1998 as seen in encl. 87. In short, both encls. 84 and 87 were the same and they replied to encl. 80. The first defendant too affirmed an affidavit on 9 March 1998 which was filed on 10 March 1998 as seen in encl. 89 and encl. 89 served as a reply to encls. 76, 84 and 87. The third defendant did not take any chances and he affirmed affidavit in reply in encl. 90 on 10 March 1998 which was filed on the same day. Enclosure 90 replied to encls. 84 and 87. The plaintiff then affirmed an affidavit in reply in encl. 92 on 13 February 1998 and this served as a reply to encl. 80. The plaintiff further affirmed an affidavit labelled as an affidavit in reply (No: 2) in encl. 96 on 21 March 1998 which was filed on 30 March 1998. Enclosure 96 served as a reply to encls. 80, 89 and 90. The third defendant also affirmed an affidavit in reply on 3 April 1998 which was filed on 4 April 1998 as seen in encl. 98. Now, enclosure 98 served as a reply to encl. 96. Finally, the third defendant affirmed an affidavit in reply in encl. 104 on 21 April 1998 which was filed on 22 April 1998.

It can thus be seen that in so far as encl. 77 was concerned the court had to peruse through several affidavits filed by the parties. Incidentally, this civil suit (Johor Bahru High Court Civil Suit No: 22-156-1996) was initially filed in the civil division of the High Court Kuala Lumpur *vide* Civil Suit No: S2-22-132-1996 and, subsequently, at the behest of the third defendant in encl. 24 it was transferred to the Johor Bahru High Court where it was finally slotted to this court.

The statement of claim makes for interesting reading. It shows the gullibility of the plaintiff. I will narrate the facts as garnered from the statement of claim. In early June 1995, the plaintiff was informed by Loi Teck Hoi ("Loi"), a business associate of the plaintiff, to the effect that Loi had met the first defendant who said that he could help the plaintiff acquire some land in Johor Bahru. The plaintiff, a Sarawakian, was interested in acquiring land in Johor Bahru for investment purposes and so he asked Loi to arrange for a meeting with the first defendant. On 28 June 1995 the plaintiff and Loi went to Johor Bahru to attend a meeting with the first defendant. At Senai airport, the first defendant met both of them and without furtherado the first defendant brought the plaintiff and Loi to the site of a piece of land which according to the first defendant were Lots 21448 and 1152 with an acreage of 6.5 acres located at Jalan Skudai, Bandar Johor Bahru ("said land"). It seemed that the first defendant told the plaintiff that the said land was State land and the first defendant said that he could get approval from the Johore State Government to alienate the said land to the plaintiff. The first defendant too stated that the said land was being offered at a price of RM7,500,000 and the premium sum would not exceed RM15 per square foot. Thus, relying on the statement, representation, promise and inducement of the first defendant, and after viewing the said land, the plaintiff was satisfied and he told the first defendant that he was agreeable to acquire the said land. The first defendant then gave a sample of an application letter addressed to the Johore Menteri Besar's office for the alienation of State land and told the plaintiff to prepare a similar letter following the format in the sample given but using the plaintiff's company's letter head. Upon returning to Sibu, Sarawak, the plaintiff swiftly prepared a letter dated 3 July 1995 following the format of the sample as provided by the first defendant. On 9 July 1995, the plaintiff and Loi went to Kuala Lumpur and met the first defendant at the Crown Princess Hotel and there the plaintiff gave the first defendant the plaintiff's application letter for onward transmission to the Johore Menteri Besar's office. The first defendant then asked the plaintiff to prepare a bank draft for a sum of RM6,000,000 in favour of Abd. Ghani bin Othman (NRIC No: 5834921) which was to be paid once the State Executive Council of Johore State Government approved the application. Again, relying on the statement, representation, promise, and inducement of the first defendant, and believing that the said sum will be paid to the Johore Menteri Besar on behalf of the Johore State Government, the plaintiff went to Singapore on 11 July 1995 and requested a business associate there by the name of Ting Ah Hwa ("Ting") to purchase a bank draft for the sum of S$3,450,000 which was equivalent to RM6,000,000 in favour of Abd Ghani bin Othman (NRIC No: 5834921) - as instructed by the first defendant. On 25 July 1995, the plaintiff, Loi and Chew Kwong Cheong ("Chew"), a valuer, went to Johor Bahru where they were met by the first defendant at the Senai Airport. The

plaintiff later checked into room 1614 at the Hyatt Regency Hotel, Johor Bahru. About an hour later the first defendant came to the plaintiff's room together with the second defendant. The first defendant introduced the second defendant as the confidential secretary to the Johore Menteri Besar. The second defendant then showed the plaintiff a file containing documents and letters in Bahasa Malaysia and explained to the plaintiff who was not fluent in Bahasa Malaysia, that the State Executive Council of the Johore State Government had approved the application made by the plaintiff's company to alienate the said land which was registered as lots 21448 and 1152 at Jalan Skudai, Johor Bahru. At that time, the first defendant, Loi and Chew were present and they read the contents of the letters and documents which the second defendant had brought. The second defendant then asked the plaintiff to give him the bank draft of RM6,000,000. Relying on the statement, representation, promise and inducement of the first defendant and the second defendant and in reliance to those letters and documents, the plaintiff was convinced and so he telephoned Ting who was in Singapore at the material time and requested him to bring the bank draft of RM6,000,000 to his hotel room at the Hyatt Regency Hotel, Johor Bahru. In the meantime, the plaintiff, the first defendant, the second defendant, Loi and Chew all waited patiently in the plaintiff's hotel room. About three hours later Ting arrived and he brought with him a Hongkong and Shanghai Banking Corporation Limited (Singapore) cashier's order no: 723084 for the sum S$3,450,000 dated 13 July 1995 in favour of Abd Ghani bin Othman (NRIC No: 5834921). The plaintiff then handed that cashier's order to the second defendant. On 8 September 1995, the first and the second defendants went to Sibu, Sarawak to meet the plaintiff and Loi. Both the first and the second defendants stayed at Hotel Tanahmas in Sibu. In that meeting, the second defendant handed over the following documents to the plaintiff:

(a) a letter dated 6 September 1995 from the office of the Director of Land and Mines bearing the following reference:

Reference: (8) in PTDJB/595 entitled Approval Of Land Application For Mixed Development At Lots 21448 And 1152 At Jalan Skudai, Johor Bahru Town, District Of Johor Bahru" (hereinafter referred to as "the said letter from the office of the Director of Land and Mines").

(b) Form 5A of the National Land Code from the Land Administrator, District of Johor Bahru stating that the premium to be paid is RM4,786,095.00. Surprisingly, the words "Claim Cancelled" and the Johor Land Administrator's stamp were affixed on the said Form.

The second defendant went about explaining to the plaintiff that the letter from the office of the Director of Land and Mines showed that the plaintiff's application had been approved and the payment for the premium, the first year assessment rate and other fees for the plan, border markings and registration of title had been cancelled and need not be paid by the plaintiff. According to the second defendant, this was decided in a meeting with the file reference MBJ (05) J-(213)(2). On September 1995, the second defendant requested the plaintiff to pay RM4,786,095 to him as he had succeeded in getting the premium payment and other fees cancelled. The plaintiff did not agree as the sum requested by the second defendant was too high. Finally, after some persuasion from the second defendant, the plaintiff agreed to pay RM4,000,000 in two instalment payments for the services of the first and second defendants. The second defendant also requested the payment to be made in cash. On 11 September 1995, the second defendant sent by fax to the plaintiff a receipt no: 1730 dated 31 July 1995 from the UMNO head office, Johore for the payment of S$3,450,000 as alluded to earlier. On 23 September 1995 the plaintiff, Loi and Ting went to Johor Bahru to meet the second defendant in a coffee house at the Hyatt Regency Hotel, Johor Bahru. Relying on the statement, representation, promise and inducement of the second defendant and based on the letters and documents as alluded to earlier, the plaintiff handed to the second defendant a bag containing RM2,000,000 in cash as the first instalment payment. The second defendant then telephoned a woman and asked her to come to the said hotel. The second defendant told the plaintiff, Loi and Ting that the woman is the "wife" of the Johore Menteri Besar. The second defendant later gave the said woman the bag containing RM2,000,000 in cash. A few days later, the plaintiff contacted the second defendant to enquire whether the second defendant could get the lease of the said land extended from 99 years to 999 years. The second defendant told the plaintiff that he could do so provided the plaintiff paid him RM1,000,000 for his services. Once again, relying on the statement, representation, promise and inducement of the second defendant that the lease of the land could be extended, the plaintiff contacted Ting in Singapore on 4 October 1995 and requested him to prepare RM1,000,000 in cash. The plaintiff then asked Ting to hand over the money to the second defendant at the Hyatt Regency Hotel, Johor Bahru on the next day. On 5 October 1995 Ting telephoned the plaintiff and informed the latter that he had given RM1,000,000 in cash to the second defendant. A few days later, the second defendant contacted the plaintiff and asked for a further RM300,000 in cash to be paid to the second defendant for the purpose of expediting the process of extending the lease of the said land from 99 years to 999 years. Again, relying on the statement, representation, promise and inducement of the second defendant, the plaintiff contacted Ting in Singapore on 26 October 1995 and requested him to prepare

RM300,000 in cash and then to hand over the money to the second defendant the next day at the Hyatt Regency Hotel, Johor Bahru. On 27 October 1995, Ting telephoned the plaintiff and informed the plaintiff that he had handed over RM300,000 cash to the second defendant. In early January 1996 concerted attempts by the plaintiff and Loi to contact the second defendant as well as the first defendant were unsuccessful. The plaintiff suspected something was amiss. So the plaintiff, Loi and Chew then went to Johor Bahru on 22 January 1996 to investigate the matter. Upon arrival at Johor Bahru, the plaintiff instructed Chew to go to the Johore Land office to conduct a search and confirm whether the said letter from the office of the Director of Land and Mines was genuine or false. Chew did so as instructed and on 24 January 1996, Chew informed the plaintiff that the said letter from the office of the Director of Land and Mines was false. On 26 January 1996, the plaintiff and Chew met the confidential secretary to the Johore Menteri Besar by the name of Hj Badari bin Dasuki ("Hj Badari") who told them that the second defendant was not the confidential secretary to the Johore Menteri Besar. Hj Badari also went to the extent of confirming that the file with the reference MBJ(05)J – (213)(2) appearing in the letter of approval did not exist at all. The plaintiff and Chew also met the Johore Menteri Besar – YAB Dato' Abdul Ghani Othman who confirmed that the second defendant was not his confidential secretary and he accordingly advised the plaintiff to lodge a police report. Without furtherado the plaintiff lodged a police report on 2 February 1996 *vide* Johor Bahru report no: 2682/96. Police investigations resulted in charges being preferred against all the defendants in the Johor Bahru Sessions Court. All the defendants claimed trial and the hearing proceeded as scheduled. It is germane at this juncture to set out the charges levied against all the defendants. Thus, the charge against the first defendant *vide* Sessions Court arrest case no: 62-22-96 was worded as follows:

Charge against the First Defendant (Johor Bahru Sessions Court Arrest Case No. 62-22-96

That you, between the 28th day of June 1995 and the 25th day of July 1995, at the Hyatt Regency Hotel, Jalan Sungei Chat in the district of Johor Bahru, in the state of Johor cheated Dato' Ding Lian Cheon NRIC No. K314993, a director of Solid Estate (Sarawak) Sdn Bhd by deceiving him into believing that you had obtained the approval from the Johor Executive Council for the application to acquire land at Lot 21448 and Lot 1152 at Jalan Skudai, Johor Bahru, Johor by Solid Estate (Sarawak) Sdn Bhd and therefore, you had dishonestly induced Dato' Ding Lian Cheon to deliver a Hongkong and Shanghai Banking Corporation Limited, Singapore Cashier's Order No. 723084 for a sum of S$3,450,000.00 in favour of Abdul Ghani bin Othman, NRIC No: 5834921, dated 13th July 1995, to Md. Jhomi bin Md. Supian NRIC 4648978 as payment for obtaining the approval of the said application, and

Dato' Ding Lian Cheon would not have done so had he not been so deceived, and that you have thereby committed an offence under Section 420 (of the) Penal Code and punishable under the same provision.

The charges framed against the second defendant *vide* Sessions Court arrest case no: 62-21-96 were worded thus:

Charges against the Second Defendant (Johor Bahru Sessions Court Arrest Case No. 62-21-96)

(1) That you, between the 28th day of June 1995 and the 25th day of July 1995, at the Hyatt Regency Hotel, Jalan Sungei Chat in the district of Johor Bahru, Johor cheated Dato' Ding Lian Cheon NRIC No. K314933, a director of Solid Estate (Sarawak) Sdn Bhd by deceiving him into believing him that you had obtained the approval from the Johor Executive Council for the application to acquire land at Lot 21448 and Lot 1152 at Jalan Skudai, Johor Bahru, Johor by Solid Estate (Sarawak) Sdn Bhd and therefore you had dishonestly induced Dato' Ding Lian Cheon to deliver a Hongkong and Shanghai Banking Corporation Limited, Singapore Cashier's Order No. 723084 for a sum of S$3,450,000.00 in favour of Abdul Ghani Bin Othman, NRIC No: 5834921, dated 13th July 1995 to Md. Jhomi Bin Md. Supian NRIC No: 4648978 as payment for obtaining the approval of the said application, and Dato' Ding Lian Cheon would not have done so had he not been so deceived, and that you have thereby committed an offence under Section 420 (of the) Penal Code and punishable under the same provision.

(2) That you, on or about 10th day of September 1995, at Hotel Tanahmas, Lot 277, Block 5, Jalan Kampong Nyabor, in the district of Sibu, in the state of Sarawak, cheated Dato' Ding Lian Cheon, NRIC No: K314993, a director of Solid Estate (Sarawak) Sdn Bhd by deceiving him into believing that you had obtained the approval from the Johor Executive Council for the application to acquire land at Lot 21448 and Lot 1152, at Jalan Skudai, Johor Bahru, Johor by Solid Estate (Sarawak) Sdn Bhd and therefore you had dishonestly induced Dato' Ding Lian Cheon to deliver a sum of RM2,000,000.00 in cash to you on 23rd September 1995 at the Hyatt Regency Hotel at Jalan Sungei Chat, in the district of Johor Bahru, in the state of Johor, for succeeding in getting the cancellation of the premium claims and other said claims for the said land application, and Dato' Ding Lian Cheon would not have done so had he not been so deceived and that you have thereby committed an offence under Section 420 (of the) Penal Code and punishable under the same provision.

(3) That you, between the 23rd day of September 1995 and the 27th day of October 1995 at No. 17, Jalan Wong Nai Siong in the district of Sibu, in the state of Sarawak, cheated Dato' Ding Lian Cheon NRIC No: K314993, a director of Solid Estate (Sarawak) Sdn Bhd by deceiving him

into believing that you had obtained the approval from the Johor Executive Council for the application to acquire land at Lot 21448 and Lot 1152 at Jalan Skudai, Johor Bahru, Johor from 99 years to 999 years and that you have thereby dishonestly induced Dato' Ding Lian Cheon to deliver a sum of RM1,300,000.00 in cash to you at the Hyatt Regency Hotel, at Jalan Sungei Chat, Johor Bahru, Johor for the purpose of obtaining the said approval, and Dato' Ding Lian Cheon would not have done so had he not been so deceived, and that you have thereby committed an offence under Section 420 (of the) Penal Code and punishable under the same provision.

The third defendant was not spared and he too faced a criminal charge *vide* Johor Bahru Sessions Court arrest case no: 62-21-96 as follows:

Charge against the Third Defendant (Johor Bahru Sessions Court Arrest Case No: 62-21-96)

'That you, between the 28th day of June 1995 and the 25th day of July 1995, at Hyatt Regency Hotel, Jalan Sungei Chat, in the district of Johor Bahru, in the state of Johor, abetted with Yap You Jee NRIC No: 490216-01-5405 and Md. Jhomi Bin Md. Supian NRIC No: 540516-01-5375 to cheat Dato' Ding Lian Cheon NRIC No: K314993, a director of Solid Estate (Sarawak) Sdn Bhd by deceiving him into believing that you had obtained the approval from the Johor Executive Council for the land at Lot 21448 and Lot 1152, at Jalan Skudai, Johor Bahru, Johor by Solid Estate (Sarawak) Sdn Bhd, and therefore, you had dishonestly induced Dato' Ding Lian Cheon to deliver a Hongkong and Shanghai Banking Corporation Limited, Singapore Cashier's Order No. 723084 dated 13th July 1995 for the sum of $3,450,000.00 in favour of Abdul Ghani Bin Othman NRIC No: 5834921 to Md. Jhomi Bin Md. Supian NRIC No. 4648978 as payment for successfully obtaining the approval for the said application and Dato' Ding Lian Cheon would not have done so had he not been so deceived and that you have thereby committed an offence under Section 109 and Section 420 (of the) Penal Code and punishable under the same provisions'.

The Johor Bahru Sessions Court rightly ordered the abovementioned charges to be jointly tried. All the three defendants were released on bail of RM1 million each in one surety and they were required to surrender their international passports to the court. It has now transpired that the prosecution had closed its case and had tendered some amended charges. I have ascertained from the relevant court file that the amended charges against the first defendant comprised an amended principal charge under s. 420 of the Penal Code read with s. 34 of the same Code together with an alternative charge to the amended principal charge under s. 420 of the Penal Code. The second defendant too faced an amended first charge under s. 420 of the Penal Code read with s. 34 of the same Code and an alternative charge to the amended first charge under s. 420 of the Penal Code. In addition to that, the second defendant also faced an

amended second charge under s. 420 of the Penal Code read with s. 34 of the same Code. There is also an amended third charge against the second defendant under s. 420 of the Penal Code. The third defendant faced an amended first charge under s. 420 of the Penal Code read with s. 34 of the same Code together with an alternative first charge to the amended first charge under s. 420 of the Penal Code punishable under s. 109 of the Penal Code read with s. 420 of the same Code. The third defendant also faced an alternative second charge to the amended first charge under s. 420 of the Penal Code punishable under s. 109 of the Penal Code read with s. 420 of the Penal Code. Finally, the third accused for his role in the sordid affair faced a charge captioned second charge under s. 420 of the Penal Code read with s. 34 of the same Code. As a result of these amended charges, the defence applied to recall and further cross-examine a few witnesses. Section 420 of the Penal Code enacts as follows:

> Whoever cheats and thereby dishonestly induces the person deceived, whether or not the deception practised was the sole or main inducement, to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

The word "dishonestly" covers two types of situations. Firstly, the intention of causing wrongful gain to one person and, secondly, the intention of causing wrongful loss to another; and it is sufficient for the prosecution to prove the existence of only one of them as the law does not require that both types of situations to be proved (*Tulsi Ram and others v. The State of Uttar Pradesh* [1963] AIR vol 50, All 666 (SC)). There must be dishonest intention on the part of the offender and the requirement of dishonesty is satisfied if there is an intention to make wrongful gain on the part of the person cheating even though there is no intention to cause wrongful loss to the person cheated (*Solomon Ezekiel and another v. Emperor* [1939] AIR (Calcutta) 376). Of pertinence would be the requirement that the dishonest intention must either precede or accompany the act of dishonesty (*Hemraj* [1910] 11 Cr LJ 295). An offence under s. 420 of the Penal Code brings to mind s. 417 of the Penal Code, a section on punishment for simple cheating. Section 415 of the Penal Code enacts that whoever by deceiving any person whether or not such deception was the sole or main inducement:

(a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property; or

(b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property, is said to "cheat".

The ingredients of cheating under s. 415 of the Penal Code may be listed as follows:

(1) Deception of any person, whether or not such deception was the sole or main inducement.

(2) By fraudulently or dishonestly inducing that person:

(a) to deliver any property to any person, or

(b) to consent that any person shall retain any property, or

(c) intentionally inducing that person to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property.

As can be seen, the word "fraudulently" is not employed in s. 420 of the Penal Code. To constitute cheating under s. 415 of the Penal Code, the deception must be with a dishonest or fraudulent intent. There is a marked difference between s. 417 of the Penal Code and s. 420 of the Penal Code. It is this. In pursuance of the deception, no property passes, then the offence is one of cheating and punishable under s. 417 of the Penal Code. On the other end of the scale, where, in pursuance of the deception, property is delivered, the offence is punishable under s. 420 of the Penal Code.

In the context of s. 420 of the Penal Code, the word "property" refers to movable property and it includes money (*Birendra Lal Bhaduri* [1904] 32 Cal 22). In essence, an offence under s. 420 of the Penal Code is complete when there is cheating and dishonestly inducing delivery of property. It is an essential ingredient of the offence that at the time the accused committed it, the representation was false to his knowledge and he made it with the intention to deceive (*The Public Prosecutor v. K Bhimeswara Rao* [1948] AIR Madras 258). There should be direct connection between the false representation and the delivery of property for the doing of something by the person deceived. It follows therefore that the damage or harm caused or likely to be caused by the accused must be the necessary consequence of the act or omission complained of (*Public Prosecutor v. Thall Gangadharadu* [1956] Andh WR 805). To sustain a conviction under s. 420 of the Penal Code, it must be established that the accused practised deception and dishonestly induced the

person so deceived to deliver the property. The word "dishonestly" is defined in s. 24 of the Penal Code and it is ideal to reproduce that section as follows:

> 24. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing 'dishonestly'.
>
> Explanation - In relation to the offence of criminal misappropriation or criminal breach of trust it is immaterial whether there was an intention to defraud or to deceive any person.

and it implies a deliberate intention to cause wrongful gain, or wrongful loss and when so combined with the offence of cheating and delivery of property, it becomes an offence and punishable under s. 420 of the Penal Code. The word "dishonestly" is used in relation to property which must necessarily include "money" and the word "intention" must be in relation to causing wrongful gain or wrongful loss to a person. I am of the view that the word "dishonestly" must relate to an advantage gained by an accused in the course of perpetrating a deceit which the accused is not legally and equitably entitled. Thus, where an accused with the intention of causing wrongful loss to his victim makes a false representation to his victim or suppresses certain facts, the accused is said to have acted dishonestly even if the law does not require him to state the truth (*Kuldip Singh* [1954] Pun 691). The plaintiff's stand was that he would not have given the cashier's order of S$3,450,000 which was equivalent to RM6,000,000 and the RM3,300,000 in cash to the second defendant but for the statements, representations, promises and inducements given by the first and second defendants. According to the plaintiff, the promises made by both the first and second defendants were false and they had committed fraud against the plaintiff. The plaintiff too alleged that there was a breach of an oral contract by both the first and the second defendants when they failed to carry out their obligations even though they and the third defendant have received a sum of RM9,300,000 in cashier's order and cash on different occasions as alluded to earlier. Alternatively, the plaintiff was of the view that the contract was void because of misrepresentation and fraud committed by the first, second and third defendants. According to the plaintiff since the contract was void, the first, second and third defendants were required to return to the plaintiff all the monies received from the plaintiff totalling RM9,300,000. As a result of the fraud perpetrated by the first, second and third defendants, the plaintiff suffered not only a loss of RM9,300,000 but also loss of opportunities for investments compounded by mental anguish, anger and anxiety as a result of being cheated as well as the untold embarrassment that he had to endure. The plaintiff did not remain idle. A search conducted at the registry of companies revealed that the third defendant was the majority shareholder and a director of at least two

companies namely Joperma Development Sdn Bhd and Perusahaan Joperma Sdn Bhd. Both these two companies received large amounts of monies out of the monies received by the second defendant from the plaintiff. It was the stand of the plaintiff that the monies entered into the accounts of both these two companies came from the plaintiff – monies that had earlier been paid to the second defendant. A search conducted at the Road Transport Department revealed a startling scenario. The third defendant had bought two luxury cars, namely, a Mercedes Benz S320 bearing registration number JDH 1 on 17 January 1996 and a Mercedes Benz 400 SE bearing registration number JCY 1. The search also revealed that the wife of the third defendant by the name of Zulaiha bt Abd Kadir had bought a Mercedes Benz 190E bearing registration number JDS 1111 and another luxury car – a Rolls Royce bearing registration number JDS 1. The Rolls Royce was registered in the name of Ho Siew Lim ("Ho") of no: 17-36, Kampong Baru Kelapa Sawit, 81030 Kulai, Johor Darul Takzim. The plaintiff verily believed that the monies that were used to purchase these cars came from the RM9,300,000 alluded to earlier. The plaintiff verily believed that on 26 July 1995, one Abdul Ghani bin Othman (NRIC No: 5834921) went to Hongkong and Shanghai Banking Corporation Limited in Singapore and applied for a telegraphic transfer of the cashier's order no: 723089 for the sum of S$3,450,000 which was equivalent to RM6,000,000.00 into the savings account no: 311-5-079935 belonging to Abdul Ghani bin Othman (NRIC No: 5834921) in Hongkong Bank Malaysia Berhad ("HBMB"), Johor Bahru. It was revealed that the savings account in HBMB was opened on 26 July 1995 and on 27 February 1996 the total sum of RM6,000,000 was transferred from the savings account into the current account no: 312672008 of HBMB. Incidentally, the current account with HBMB was opened on 27 February 1996 in the name of Abdul Ghani bin Othman (NRIC no: 5834921). The plaintiff verily believed that when Abdul Ghani bin Othman opened the current account with HBMB in Johor Bahru he was accompanied by the third defendant. It was the third defendant who answered all the questions posed by HBMB on behalf of Abdul Ghani bin Othman. The sum of RM6 million which was entered into the current account with HBMB was withdrawn in the following manner:

(1) A cheque no: 332826 for RM50,000 was cashed by one Rusli Shah bin Alwi, a manager with Syarikat Joperma Development Sdn Bhd.

(2) A cheque no: 332828 for RM500,000 was deposited into the account of Syarikat Perusahaan Joperma Sdn Bhd no: 001011-610520 at Malayan Banking Berhad, Johor Bahru branch.

(3) A cheque no: 332830 for RM1,800,000 was withdrawn in the name of the first defendant and was deposited into his account at HBMB branch at Jalan Bukit Bintang, Kuala Lumpur.

(4) A cheque no: 332832 for RM3,000,000 was paid in favour of one Lim Boey Geok ("Lim") and credited into Lim's account in Maybank Berhad branch at Johor Bahru and was later withdrawn from that account and paid to the third defendant.

(5) A cash cheque no: 332835 for RM75,994.52 was withdrawn and utilised to make payment for the purchase price of a Rolls Royce car bearing registration number JDS 1.

(6) A cheque no: 332838 for RM142,951.60 was withdrawn and utilised to make payment to MBF Finance Berhad's branch at Kulai, Johor Bahru as hire purchase payment for the Mercedes Benz S320 bearing registration number JDH 1.

On these facts, the plaintiff verily believed that the third defendant was also involved or had conspired with the first and second defendants in breaching the contract. The third defendant too like the first and second defendants had misrepresented and committed fraud against the plaintiff.

I have endeavoured to narrate the facts of the case in some detail as garnered from the statement of claim without going into the merits of the whole case.

It would be too premature to dwell on the issues as raised in the statement of claim as the right forum to ventilate those issues would be at the trial proper. This judgment do not decide the criminal liabilities of the defendants nor do this judgment reflect the civil liabilities of the defendants. This judgment was prepared solely for the purpose of adjudicating encl. 77 and nothing else.

Briefly put, the chronology of events would be as follows:

(1) On 27 March 1996, the plaintiff commenced this suit.

(2) On 2 February 1996, the plaintiff lodged a police report and this resulted in all the three defendants being charged in the Johor Bahru Sessions Court *vide* arrest case numbers 62-20, 21, and 22 of 1996.

(3) The present civil suit was filed after all the three defendants were charged in the Johor Bahru Sessions Court but the civil suit has yet to begin.

(4) The criminal trial is still pending and at its advanced stage with the prosecution closing its case and amending the charges and the defence recalling certain witnesses.

(5) On 27 March 1996, the plaintiff filed an application for a mareva injunction and vigorously opposed by the first and the third defendants.

(6) On 11 June 1996, the first defendant filed his statement of defence as seen in encl. 25.

(7) On 15 May 1996, the third defendant filed his statement of defence as reflected in encl. 12.

(8) On 24 September 1996, the summons for directions was filed and an order was obtained on 17 October 1996.

(9) On 15 April 1997, the plaintiff withdrew his application for mareva injunction.

(10) On 8 December 1997, the plaintiff filed encl. 77.

Must I accede to the plaintiff's application in encl. 77? Mr Tan Hock Chuan, learned counsel for the plaintiff, vigorously argued out that the facts in both the criminal and civil cases were on similar lines and priority should be given to the criminal case. This would ensure that the defendants would not be prejudiced and this seems to be the rationale in giving priority to the criminal case. The rationale would be clearly appreciated if the defendants were to apply for stay of the civil matter. But in the context of the present case, it was the plaintiff and not the defendants who filed encl. 77. It was for this reason that Mr RK Menon, learned counsel for the defendants, craved this court's indulgence to refuse the application in encl. 77 and proceed with the hearing of the civil matter notwithstanding that the criminal case was still ongoing and mid way through. Mr Tan Hock Chuan argued that in the event the civil case was not postponed then the defendants as accused persons in the criminal cases would lose their basic and inherent rights to remain silent and not give evidence. Mr RK Menon argued that it was too late in the day for the plaintiff to be concerned about the welfare of the defendants. It was argued that the plaintiff had ensured that the defendants had not only exposed all their exhibits but also their lines of defences to the plaintiff. It was an exposure that was fatal to the defendants once the plaintiff commenced the mareva injunction application. It was a tactical move on the part of the plaintiff as the latter was not concerned about protecting the defendants' rights to silence. It is now trite law that the purpose of a mareva injunction, being an interlocutory order, is designed to prevent a defendant from negating the effect of a judgment which may be entered against him by disposing of his assets before execution on the judgment can be levied. It is a major and classical departure from the traditional common law principle that a person "cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property" (*Robinson v. Pickering* [1881] 16 Ch D 660 and *Lister & Co. v. Stubbs* [1890] 45 Ch D 1). The Federal Court in *Zainal Abidin bin Hj Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 260 held that the courts have the

jurisdiction to grant mareva injunctions in appropriate circumstances by virtue of para. 6 to the schedule of the Courts of Judicature Act 1964. This was subsequently followed by *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 and *Aspatra Sdn Bhd & 21 Ors v. Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97. So long as there is a danger that the assets will be dissipated within the court's jurisdiction as well as in cases where there is a danger of the removal of assets out of jurisdiction, then the mareva injunction would be granted (*Prince Abdul Rahman v. Abu Taha* [1980] 3 All ER 409). Thus, knowing fully well the scope of the mareva injunction and its ramifications the defendants went overboard and exposed their lines of defences when they challenged the plaintiff's application for the mareva injunction. In short, because of the mareva injunction application the defendants were forced to disclose all their documents as well as their lines of defences. It was argued that all the plaintiff needs to do is to peruse through all the affidavits filed by the defendants to resist the mareva injunction application and the plaintiff would know the whole defence of the defendants. Somehow it was even argued that the prosecution too could do the same. After all the affidavits are easily available – they being public documents. The plaintiff was a strategist and chose the most apt mode of attack on the defendants so as to pry open the defendants' secrets. It was the submission of Mr RK Menon that the plaintiff had put the defendants to great risk. It was quite unfair and in fact inequitable for the plaintiff to want to adjourn the civil suit as the plaintiff, all along, did not have the defendants' interests at heart. It was submitted, somewhat vigorously, that there was no need for the plaintiff to wait until the conclusion of the criminal case. The plaintiff has a list of all his exhibits and he should not have a problem in compiling his bundle of documents and proceed with the civil suit, so submitted Mr RK Menon.

The first and the third defendants felt that it would be in their interests to have the civil suit heard and disposed off as soon as possible without waiting for the completion of the criminal trial.

I will now proceed to examine some English cases in order to resolve encl. 77. For a start, I shall refer to the case of *Smith & Anor v. Selwyn* [1914-1915] All ER Rep 229. That was a case where the court held that a plaintiff against whom a felony had been alleged by the defendant cannot make that felony the basis of an action unless the defendant had been prosecuted or some good reason had been given why a prosecution had not taken place. That was also a case where arising out of the rape episode and the consequent mental anguish, the plaintiffs sued the defendant for damages and the court held that that civil suit should be kept in abeyance until the defendant had been prosecuted or some good reason had been advanced as to why the defendant

had not been prosecuted. The plaintiffs in that case were husband and wife and by their statement of claim they alleged the following facts: That the plaintiff Dorothy Smith was the wife of the plaintiff William Charles Smith, and at the time of the grievances hereinafter complained of resided with him at No. 1, Dudley Road, Ilford, Essex. In and about December 1913, Dorothy Smith was desirous of obtaining an engagement as a vocalist on the theatrical or music-hall stage, and in response to an advertisement in the 'Stage' newspaper of 11 December 1913, attended at the Hippodrome, Greenwich, and there saw the defendant. The defendant was part proprietor and the manager of the Hippodrome. On 11 December 1913, the plaintiff was given a trial turn at the Hippodrome, and was afterwards, on the said day in her professional name of 'Miss Dorothy Hayes' by a contract in writing signed by the defendant, engaged by the defendant to appear at the Hippodrome as a vocalist, on a date to be arranged, at a salary of 3 pound per week, and to give one matinee if required. The plaintiff accepted the said engagement, and it was on 11 December 1913, subsequently verbally agreed that her engagement should commence on 15 December 1913. But on 12 December 1913, the defendant, intending and contriving to corrupt and violently or otherwise have criminal relations with the plaintiff, by a telephone message to the plaintiff, induced the plaintiff to attend a rehearsal and the plaintiff did attend at the Hippodrome. The defendant on 13 December 1913, at the Hippodrome, then intending and contriving as aforesaid in pursuance of his designs, verbally induced the plaintiff to accept and partake of some liquid alleged by the defendant and believed by the plaintiff to be brandy, but which, as the defendant well knew, was not brandy but was brandy and/or a liquid mixed with or composed of some noxious poisonous narcotic or other drug (the name of which was unknown to the plaintiff or either of them) which, as the defendant well knew, was calculated and intended to have the effect of rendering the plaintiff powerless and incapable of muscular control or resistance, and of reducing her to a state of collapse and insensibility. The plaintiff being so induced by the defendant; and believing as aforesaid, drank part of the said liquid, and almost immediately thereafter and in consequence thereof became injuriously affected and oppressed by a sense of suffocation and giddiness, and was rendered powerless and incapable of muscular control or resistance and was reduced to a state of collapse and insensibility, and while the plaintiff was so affected as aforesaid and under the influence of the said drug the defendant unlawfully and indecently assaulted the plaintiff, and violently against her will had, or alternatively attempted to have, carnal knowledge and intercourse with her. In consequence thereof the plaintiff became ill and suffered both mental and physical pain, and for a long time feared pregnancy, and she was in consequence unable to discharge her household duties and her marital relations with her husband, William Charles

Smith, became strained and impaired, and she lost for a long time the consortium of her husband, and she was and still was unable to follow her occupation, and she lost the benefit of her engagement as a vocalist at the Hippodrome and she was injured in her character, credit, and reputation as a vocalist. And the plaintiff, William Charles Smith, lost the services of his wife in the discharge of her household duties, and his marital relations with her were and became strained and impaired and he lost the consortium of his wife. The plaintiffs claimed damages. The defendant then applied in chambers for an order to stay or dismiss the action as being an abuse of the process of the court on the ground that the statement of claim disclosed, as the basis of the action, a felony under s. 22 of the Offences against the Person Act 1861, for which the defendant had not been prosecuted. On 5 March 1914, Master Chitty made an order refusing the application to stay the action; and that order was affirmed by Lord Coleridge, J, on 13 March 1914. The defendant appealed.

Kennedy LJ, Swinfen Eady LJ and Phillimore LJ wrote separate short judgments and they held that the civil action to be stayed until after the criminal proceedings have been taken against the defendant. Swinfen Eady LJ had this to say at p. 232 of the report:

> It is now well established that, according to the law of England, where injuries are inflicted on the civil rights of an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution.

and he continued at the same page:

> So, too, Cockburn CJ, in *Wells v. Abrahams* [1872] LR 7 QB 554, 557 said:
>
> > No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy - that is, the right of redress by action - is suspended until the party inflicting the injury has been prosecuted.

It must be emphasised that it was the defendant in *Smith And Another v. Selwyn (supra)* who applied in chambers for a stay. Here, it was the plaintiff who applied for a stay as seen in encl. 77.

Next, it would be the case of *Jefferson Ltd v. Bhetcha* [1979] 2 All ER 1108 CA. In that case the facts may be stated as follows: The plaintiffs employed the defendant as a general accounts clerk from March 1978 until 30 September 1978, when she was dismissed. In November 1978 the plaintiffs discovered that five cheques appeared to have been misappropriated. Three out of the five

cheques had been paid into a building society account in the defendant's name and the remaining two into an account of a friend of hers. The plaintiffs brought an action against the defendant claiming 29,190.46 pound, being the total value of the cheques. After the defendant had entered an appearance, the plaintiffs applied by summons for summary judgment under RSC O. 14. By then criminal proceedings were also pending against the defendant in respect of the cheques. In an affidavit, the defendant stated that she had a defence both to the action and the criminal charges, but that if she was required to swear an affidavit in opposition to the plaintiffs' summons under RSC O. 14 it would necessarily disclose her defence to the criminal charges and prejudice her trial because she would be giving the prosecution advance notice of her case. She contended that the plaintiffs' action against her should be stayed until the conclusion of the criminal proceedings. On the defendant's undertaking to pay 24,206.80 pound into a solicitors' joint account, the judge ordered the summons for summary judgment to be adjourned until after her trial. The judge apparently acted on the basis that it was an absolute principle of law that where there were concurrent civil and criminal proceedings against a defendant in respect of the same subject-matter the defendant's right of silence in the criminal proceedings carried through to the civil proceedings and the defendant was therefore entitled in the civil action to be excused from taking any procedural step which would in the ordinary way be necessary or desirable to take in furtherance of his defence in that action, if that step would or might have the result of disclosing in whole or in part his actual or likely defence in the criminal proceedings. The plaintiffs appealed against the judge's order. The defendant cross-appealed, contending that the appropriate form of relief was not an order adjourning the RSC O. 14 summons but an order staying the civil action until the conclusion of the criminal proceedings.

The Court of Appeal held that the protection given to a defendant facing a criminal charge (ie, the right of silence) did not extend to giving him as a matter of right the same protection in concurrent civil proceedings. The Court of Appeal too held that the court having control of the civil proceedings could, however, in the exercise of its discretion under s. 41 of the Supreme Court of Judicature (Consolidation) Act 1925, stay those proceedings if it appeared to the court that justice so required, having regard to the concurrent criminal proceedings and the defendant's right of silence in relation to those proceedings and the reason for that right. However, the Court of Appeal held that the burden was on the defendant in the civil proceedings to show that it was just and convenient that the plaintiffs' ordinary rights in respect of the action (ie, of having his claim processed, heard and decided) should be interfered with. It was an important factor to be taken into account by the court in deciding whether to grant a stay (which in the present case would be the appropriate form of relief if the defendant was entitled to any relief) was whether there

was a real, and not merely a potential, danger that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings. The Court of Appeal further held that on the facts, the defendant had not established that it was either just or convenient for the civil action to be stayed, or indeed for the RSC O. 14 proceedings to be adjourned. The Court of Appeal then allowed the appeal and the RSC O. 14 summons restored and the Court of Appeal further held that the defendant was to be at liberty to submit further evidence to the court on the rehearing of the summons.

Megaw LJ delivering the judgment of the Court of Appeal in *Jefferson Ltd v. Bhetcha (supra)* had this to say at p. 1113 of the report:

> I should be prepared to accept that the court which is competent to control the proceedings in the civil action, whether it be a master, a judge, or this court, would have a discretion, under section 41 of the Supreme Court of Judicature (Consolidation) Act 1925, to stay the proceedings, if it appeared to the court that justice (the balancing of justice between the parties) so required, having regard to the concurrent criminal proceedings, and taking into account the principle, which applies in the criminal proceeding itself, of what is sometimes referred to as the 'right of silence' and the reason why that right, under the law as it stands, is a right of a defendant in criminal proceedings. But in the civil court it would be a matter of discretion, and not of right. There is, I say again, in my judgment, no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action in accordance with the normal rules for the conduct of civil actions merely because so to do would, or might, result in the defendant, if he wished to defend the action, having to disclose, by an affidavit under O. 14, or in the pleading of his defence, or by way of discovery or otherwise, what his defence is or may be, in whole or in part, with the result that he might be giving an indication of what his defence was likely to be in the contemporaneous criminal proceedings. The protection which is at present given to one facing a criminal charge (the so-called 'right of silence') does not extend to give the defendant as a matter of right the same protection in contemporaneous civil proceedings.
>
> Counsel for the defendant, though he submitted that there was such a general principle, accepted that it was not a principle of absolute and invariable application, but that there was a measure of discretion in the court. He submitted, however, that in this case there ought here to be a stay of the proceedings in the civil action until such time as the criminal proceedings have come to a conclusion. In my judgment, while each case must be judged on its own facts, the burden is on the defendant in the civil action to show that it is just and convenient that the plaintiff's ordinary rights of having his claim processed and heard and decided should be interfered with.

> Of course, one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings. There may be cases (no doubt there are) where that discretion should be exercised. In my view it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors. By way of example, a relevant factor telling in favour of a defendant might well be the fact that the civil action, or some step in it, would be likely to obtain such publicity as might sensibly be expected to reach, and to influence, persons who would or might be jurors in criminal proceedings. It may be that, if the criminal proceedings were likely to be heard in a very short time (such as was the fact in the *Wonder Heat* case [1960] VR 489 in the Victoria Supreme Court) it would be fair and sensible to postpone the hearing of the civil action. It might be that it could be shown, or inferred, that there was some real, not merely notional, danger that the disclosure of the defence in the civil action would, or might, lead to a potential miscarriage of justice in the criminal proceedings, by, for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way.

Again, it was the defendant in *Jefferson Ltd v. Bhetcha (supra)* who applied for stay of the civil proceedings until the conclusion of the criminal proceedings unlike the present case at hand.

Halsbury's Laws of England, fourth edn, vol. 37 at para. 443 contained a passage worth repeating. It was worded thus:

> ...; and if there are concurrent civil and criminal proceedings against the same defendant arising out of the same matter, the court has a discretion whether to stay the civil proceedings pending the conclusion of the criminal proceedings, taking into account all the circumstances including the defendant's right of silence in the criminal proceedings (*Jefferson Ltd v. Bhetcha* [1979] 2 All ER 1108, [1979] 1 WLR 898, CA).

In *KM Nathersahib & Another v. Meyer Brothers* [1940] 9 MLJ (SSR) 252, the court approved the principle that a criminal prosecution must proceed before the institution of the civil action. Put differently, when an act is both a crime and a civil wrong, the prosecution for the criminal offence is generally a condition precedent to a civil action in tort at any rate in the case of non-compoundable offence. In the present case, the plaintiff saw it fit not to wait for the completion of the criminal trial and had filed the civil suit.

At the Asean level, the case of *KM Nathersahib & Another v. Meyer Brothers (supra)* was the only case of its kind that favoured criminal prosecution before the civil action. In that case the plaintiffs claimed for:

(a) a declaration that the 34 promissory notes dated on or about 12 July 1923 and made by the two plaintiffs in favour of the defendants were founded on an illegal consideration and were therefore not binding upon the plaintiffs;

(b) an order for the delivery up of the promissory notes; and

(c) an injunction restraining the defendants from negotiating the promissory notes.

The defendants, on the other hand, did not remain idle for they counterclaimed for the sum of $148,912.99 being the balance due to the defendants on the plaintiffs' account with them. It seemed that there were considerable dealings between the plaintiffs and the defendants as a result of which the plaintiffs were liable to the defendants in a very large sum of money. The defendants considered that the matter was beyond a mere civil liability and that the first plaintiff had committed a criminal offence and at the instance of the defendants the first plaintiff was arrested on 8 Jun 1923 and charged with the offence of cheating, an offence which was not compoundable. The plaintiffs alleged that the defendants had agreed to compound the prosecution in consideration of the plaintiffs executing 35 promissory notes for the amount of the plaintiffs' liability to the defendants. In fact the plaintiffs did execute the promissory notes and, subsequently, the prosecution of the first plaintiff was withdrawn and he was discharged. There was, however, considerable difference between the evidence for the plaintiffs and for the defendants particularly in regard to the withdrawal of the prosecution. The prosecution was withdrawn with the assent of the deputy public prosecutor. The judgment of the court revolved on the question that if a wrongful act was both a crime and a tort, the crime should be investigated before the court dealt with the question of civil liability in tort. Barrett-Lennard J in a very short judgment had this to say:

> Judgment will be entered for the defendants in the sum of $148,912.99 and the costs of this counterclaim. I deplore that it has fallen to me to hear these proceedings antecedently to the prosecution of the plaintiff. It is a wise rule of public policy that a jury shall pass a verdict at the Assizes before a Judge sitting alone tries the issue of criminality. It may be that, if not confronted with the authority signed by the Deputy Public Prosecutor to withdraw from the prosecution of the plaintiff, I should have insisted that his guilt or innocence be investigated by that tribunal in which Englishmen have confidence when issues of criminality are raised. But justice would not, in the circumstances, have been advanced had I adopted that course.

Incidentally, *KM Nathersahib & Another v. Meyer Brothers (supra)* was decided on 4 October 1924 in Singapore that arose out of Singapore Suit no: 908 of 1923. That was a case from Singapore decided 74 years seven months

22 days ago calculated from 4 October 1924 to 26 May 1999 – the date of the delivery of this judgment. Like the Englishmen, Malaysians too would have confidence if the issues of criminality of the defendants be decided before the disposal of the civil suits. In that case, there was a withdrawal of the cheating offence with the assent of the deputy public prosecutor. Here, the criminal offences for which the defendants were charged went full steam ahead and it was midway through.

Yet another case of interest would be the case of *Wonder Heat Pty Ltd v. Bishop* [1960] VR 489, a decision of the Supreme Court of Victoria, a judgment of Pape J. In that case the plaintiff issued a specially endorsed writ to recover a sum of 5618 pounds 9 shillings 6 pence from the defendant, being moneys which the defendant as manager of the service and installation section of the plaintiff's business was required and authorised to receive on the plaintiff's behalf and pay over to the plaintiff's cashier. The defendant had failed to pay over such moneys to the plaintiff's cashier or to the plaintiff. The plaintiff issued a summons for leave to sign final judgment against the defendant. The defendant thereupon issued a summons seeking an order that further proceedings be stayed or alternatively for an order adjourning the summons for leave to sign final judgment on the grounds that the defendant had been committed for trial for fraudulently omitting to account for moneys received as a servant of the plaintiff and that he had not yet been brought to trial. Pape J held that the appropriate course was to adjourn the summons pending the defendant's trial rather than to stay the plaintiff's action. His Lordship had this to say at p. 490 to p. 491 of the report:

> The basis upon which Mr. Shillito, who appeared for the defendant, asked me to order a stay of proceedings in the action was the principle of law which prescribes that where a civil action is brought against a defendant, and the basis of the claim is a felony committed by the defendant against the plaintiff, the action ought, as a general rule, to be stayed until the defendant has been prosecuted in respect of that felony or good cause shown why he has not been so prosecuted. It was at one time thought that this rule applied only to actions of trespass or tort (see *Master v. Miller* [1791], 4 Term R. 320; 100 E.R. 1042), and there is an interesting discussion upon the historical basis of the rule in vol. 3 of Holdsworth's History of English Law, at page 331 et seq. The modern textbooks on torts still so refer to the rule, but this is, I think, due to the nature of the subject-matter of these treatises rather than to an intention to confine the rule to torts or trespass. In Winfield, 6th ed., at page 197, it is said that 'where the same facts constitute a tort and a felony, no action for damages can be brought by the plaintiff against the defendant so long as the defendant has not been prosecuted or a reasonable cause has not been shown for his not having been prosecuted, and the court, where such an action is brought, ought to stay further proceedings, until those conditions are

satisfied. The court should only act when it is satisfied that the claim is for felony and nothing else'. See also Salmond, 12th ed., page 757; Street, 1st ed., page 105; Clerk and Lindsell 11th ed., page 147; Fleming, page 680. In Halsbury, 3rd ed., vol 1, page 11 in the article on 'Actions', the rule is stated in quite general terms in these words: 'It has long been recognised that where an injury amounts to an infringement of the civil rights of an individual and at the same time to a felony; the right of redress by action or by proof in bankruptcy is suspended until the party inflicting the injury has been prosecuted and public justice thus vindicated. The rule is based upon public policy. Formerly it appears to have been thought that the right of action was 'merged' or 'drowned' in the felony, but it is now settled that it is merely suspended.

Tracing the history of the rule and the growth of the police force, Pape J continued in serious vein at p. 491 to 492 of the report:

Any doubts as to the general application of this rule were set at rest in Victoria by the decision of Hudson, J, in *Henry Haskin & Co. Pty. Ltd. v. Hooke* [1954] VLR 300 (where his Honour stayed an action based upon very similar facts to those of this case).

An extremely interesting discussion of the history of this rule and of the earlier authorities is to be found in the judgment of Watkin Williams, J, in *Midland Insurance Co. v. Smith* [1881] 6 QBD 561. His Lordship said, at page 568: 'The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong and, therefore, no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been, a prosecution of the felon, but that there is a duty imposed upon the injured person not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one.' His Lordship then reviews the authorities in support of each of the three views. This case was referred to by Lord Parker of Waddington in The Amerika, [1916] AC 38, at page 49, with approval. At the time this decision was given in 1881 the modern police force was in its formative period. The Metropolitan Police Act 1829, the Municipal Corporations Act 1835, the City of London Police Act 1839 and the County Police Act 1840 had all created police forces to operate in purely local areas and under local control (*Halsbury*, 2nd ed., vol. 25, pages 288, 293; Encyclopaedia of the Laws of England, 2nd ed., vol. 11 pages 192, 195). The office of Director of Public Prosecutions had been created by the Prosecutions of Offences Act 1879, and by the Prosecution of

Offences Act 1884 the treasury solicitor was appointed as Director of Public Prosecutions. It was not until the Act of 1908 that the office was separated again from that of the treasury solicitor (*Encyclopaedia of the Laws of England*, 2nd ed., vol. 12 page 35).

The initiation of prosecutions for criminal offences was left largely to the individual. Stephen in his History of the Criminal Law, vol. 1, pages 493-495 (published in 1833), says that 'in England and as far as I know, in England and some English colonies alone, the prosecution of offences is left entirely to private persons or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons'.

It was inevitable that with the growth and development of the police force as we now know it, and with the abolition of the grand jury in England and its retention in Victoria in the limited cases provided for by section 354 of the Crimes Act 1958 and the institution of the present practice whereby the Attorney-General presents offenders against the criminal law (Crimes Act 1958, section 353) and controls the proceedings by which they are tried for those offences, the necessity for the continued existence of this rule of law should be called in question. But in 1914, in *Smith v. Selwyn*, [1914] 3 KB 98, the Court of Appeal held that it was still part of the law of the land. The Court of Appeal again affirmed the existence of the rule in *Jack Clark (Rainham) Ltd v. Clark*, [1946] 2 All ER 683, but there held that before the court could exercise its power to stay an action, it must be clearly satisfied that the facts upon which the action is based amount to felony and nothing else.

The continued existence of the rule has also been thrice affirmed in our own courts, once by Hood, J, in *Barker v. Barker* [1916] VLR 695, once by Hudson, J, in 1954 in *Henry Haskin & Co. Pty. Ltd. v. Hooke* [1954] VLR 330, and again by Sholl, J, in 1958 in *Henry v. Burian* [1958] 32 ALJ 129. There can, therefore, be no doubt that the principle enunciated in these cases is still part of the law of the land.

Directing his attention to the criticisms of the rule, Pape J said tersely as seen at p. 492 to p. 493 of the report:

Nevertheless, there have been criticisms directed against it. In vol. 63, Law Quarterly Review, page 6, after referring to the difficulty of justifying the rule in its application to felonies, whilst denying its existence in the case of misdemeanours, it is said: 'But the rule is open to criticism on wider grounds. It is based upon the public policy of a by gone age when no police existed and when it was, therefore, necessary to rely on the efforts of the individual citizen to maintain law and order. Today new methods of enforcing the law have been developed - so that there is less reason to insist that a person who has been injured should set the criminal law in motion before seeking to obtain the civil reparation to which he may be entitled.

In *Rose v. Ford.* [1937] 3 All ER 359; [1937] AC 826, at page 846, Lord Wright said: 'In any event, whatever the old law may have been, the modern law is quite clear, that if the act complained of constitutes a felony, the civil remedy is not drowned, but merely suspended. But, however limited, the rule that the plaintiff must first prosecute in a case of felony is an anachronism, now that the police prosecute or are assumed to prosecute in every case of probable felony.

In *Street's Law of Torts*, 1st ed. [1955], at page 105, it is said: 'The origin of this rule probably lay in the fact that the property of a convicted felon was forfeited to the Crown. Now deprived of its original raison d'etre, the rule survives because there is said to be a policy of requiring an injured party to bring serious offenders before the criminal courts before he claims compensation for infringement of his private interests. This basis is obviously tottering now that the responsibility for enforcement of the criminal law is in fact entrusted to the police. Judicial awareness of this fact makes it difficult to forecast whether the courts will, in marginal cases, follow earlier cases where they are not directly binding or seek to narrow the rule as much as possible by grafting exceptions on to it.

I agree with these criticisms and think that there is now no justification for preserving this rule of law. In applying this rule to the circumstances of this case, two questions seem to me to arise. The first is whether that part of the rule which prescribes that the action should be stayed 'until the defendant has been prosecuted in respect of the felony' means that the defendant must have been prosecuted either to conviction or acquittal, i.e. whether the rule requires the prosecution to have concluded, or whether the requirements of the rule are satisfied if a prosecution has been commenced and the defendant committed for trial even though the prosecution has not been concluded. The second is whether, assuming the rule to require the conclusion of the prosecution, the plaintiff may still not 'show good cause why the defendant has not been so prosecuted' by establishing that the prosecution has commenced, that its conduct is in the hands of the Crown, and that it is no fault of his that the trial has not taken place.

The first of these questions, whether the prosecution must have been concluded, is by no means easy to answer. I think it is true to say that all the decided cases are cases in which no prosecution had ever been instituted, and so the question never arose. It probably never arose because it was quite unthinkable that the situation which exists here, namely, that a man could be committed for trial on charges of felony in June 1959 and could still be awaiting trial on those charges in February 1960, nine months after committal, could ever arise.

Using the above passages in the judgment of Pape J in *Wonder Heat Pty Ltd v. Bishop (supra)*, Miss Selvi Sandrasegaram of counsel for the first defendant argued that this age – worn rule should not be part of the law of our country. She correctly submitted that the prosecution of offenders in our country are

not left entirely to private persons. The public prosecutor controls prosecution and determines who is to be prosecuted. On the powers of the public prosecutor, I need to refer to art. 145(3) of the Federal Constitution which provides that:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

and Suffian LP had this to say of this clause in *Long bin Samat & Ors v. Public Prosecutor* [1974] 2 MLJ 153, 158:

> In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-33 in *Smedleys Ltd v. Breed* [1974] 2 ALL ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.
>
> Anyone who is dissatisfied with the Attorney-General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

Abdoolcader J in *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 also considered the powers of the Public Prosecutor in the context of s. 418A of the then Criminal Procedure Code (FMS Cap 6). At p. 119 of the report, his Lordship had this to say:

> Article 145(3) of the Constitution reads:
>
> > The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence ...
>
> Section 376(i) of the Code provides:
>
> > The Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.
>
> This section must certainly be circumscribed by and read subject to and in the light of the provisions of Article 145(3) of the Constitution which in effect only restate and are declaratory of the existing powers and

duties of the Attorney-General in relation to criminal prosecutions and proceedings at the date the Constitution was promulgated.

The Solicitor-General lays considerable stress on the wide powers of the Attorney-General in England in their historical context, stating he is a master to himself, and submits the same applies to the Attorney-General of Malaysia. It must be remembered however that the constitutional rights, powers and duties of our Attorney-General are specifically spelt out in Article 145 of the Constitution and in particular in clauses (2) and (3) thereof, and it is clause (3) of that Article which is relevant and material to the issue before me and which circumscribes and specifies the limits of his functions and powers in relation to criminal proceedings. It would be dangerous therefore to go beyond this specific constitutional provision and rely on the position in England by historical analogy to justify any action of the Attorney-General in our country which does not come within the ambit of that provision.

It would now be necessary to consider the connotation of the words 'institute' and 'conduct' in Article 145 (3).

'Institute' in Article 145 (3) cannot cover the subject-matter of section 418A of the Code, as the Solicitor-General contends. It must necessarily refer to the commencement of criminal proceedings and prosecutions and not to such as have already been instituted and are pending or to criminal procedure as such. It may well be, as the Solicitor-General submits, that the Public Prosecutor has power, apart from the application of the provisions of sections 417 and 418A of the Code, to direct any case triable in the Magistrate's or Sessions Court to be tried in the High Court after a preliminary inquiry. This power to so direct would, if exercised, fall squarely within his discretion to institute and conduct criminal prosecutions and proceedings. The position under section 418A of the Code is wholly different as it has no relation to the institution and for that matter the conduct of criminal proceedings but instead clearly and expressly concerns and relates to criminal cases already commenced and pending in the subordinate courts.

'Conduct' in Article 145 (3) cannot but refer to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in section 377 of the Code. And 'control and direction' in section 376(i) of the Code is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.

'Conduct' of criminal prosecutions and proceedings in Article 145 (3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the Public Prosecutor arrogating to himself the legislative powers vested in Parliament under Item 4 and in particular paragraph (b) thereof

> in List I (Federal List) in the Ninth Schedule to the Constitution, with perhaps also the not inconceptible resultant intrusion or at least a more than peripheral incursion into the sphere of Article 12 (1) of the Constitution which provides that the judicial power of the Federation is vested in two High Courts and in such inferior courts as may be provided by federal law - namely, the Subordinate Courts Act, 1948 which specifies the subordinate courts and their respective civil and criminal jurisdiction.

Further down the same page and spilling to p. 120, his Lordship continued:

> Pursuing its signification, 'to conduct' means 'to lead, guide, manage' (*In re Bhupalli Malliah* AIR 1959 And. Pra 477; Pride of *Derby v. British Celanese Ltd* [1953] 1 Ch. 149 at page 167 per Lord Evershed, M.R.). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence.

Finally, at p. 121 of the report, his Lordship rounded up the whole matter by saying:

> Article 145 (3) cannot therefore in my view on any reasonable and acceptable interpretation provide, as the Solicitor-General contends, any form of licence to override the provisions of Article 8 (1) which is a fundamental liberty under Part II of the Constitution, and perhaps even also those of Article 12 (1), and at the very least, in any event, applying the principle of harmonious construction of the Constitution - an accepted canon of constitutional interpretation, effect should be given to all these provisions as far as possible, and on that basis alone any exercise of discretionary powers by the Attorney-General must necessarily relate to reasonable classification and not arbitrary selection.
>
> No resort can be had to Article 145 (3) of the Constitution to ascertain the policy or guidance for the exercise of discretionary powers by the Attorney-General even if there were any. In *Devi Das Gopal Krishnan v. State of Punjab* AIR 1967 S.C. 1895, 1901, the Supreme Court of India reiterated (at page 1901) that a liberal construction of an impugned statute should not be carried by the courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities, and that it is the duty of the court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature. The Supreme Court in that case in considering the provisions of a section of a statute conferring uncontrolled power on the provincial Government to levy a turnover tax at such rates as the Government might direct without any guidance or policy laid down in that respect in the statute itself, held that such a policy could not be gathered from the constitutional provisions as this would destroy the doctrine of excessive delegation and would also sanction conferment

> of power by the legislature on the executive without laying down any guidelines in the statute (*ibid*, at page 1901).

Repco Holdings Bhd v. Public Prosecutor [1997] 4 CLJ 740; [1997] 3 MLJ 681 also considered these two authorities when construing the powers of the public prosecutor.

In my considered view, the purpose of a criminal trial is to find out the truth and to determine the guilt or innocence of an accused person. The public prosecutor owes a duty to the members of the public to secure a conviction at all costs and at the same time to place before the court the available evidence, be it in favour of or against the accused, and leave the matter to the court to decide (*Ram Ranjay Roy v. Emperor* ILR 42 Cal 422, 428). The public prosecutor must adopt an open mind and prosecute with all his vigour and might to obtain a conviction and bring to book recalcitrants to the altar of justice. It is an onerous duty and a responsible job. The impartiality of the public prosecutor is as vital as the impartiality of the court itself. He must endeavour to act fairly and must safeguard public interest by conducting the prosecution in a fair manner, needful always of the rights of the accused. But a caveat must be placed. The supreme law of our country the Federal Constitution, gives the public prosecutor an unfettered discretion in regard to the control and direction of all criminal prosecutions in the country and no one, not even the court, can whittle or take away that constitutional right. In short, the public prosecutor has more control over life, liberty and reputation than any other individual in Malaysia, legally speaking of course. It is not the duty of the court to refuse to hear a criminal case on the ground of public policy; rather it is the duty of the court to try an accused person according to law. How an accused person is brought before the court is not the concern of the court. However, the sage observations of Lord Salmon in *Director of Public Prosecutions v. Humphrys* [1976] 2 All ER 497 (HL) should be food for thought for every one (see p. 527 to p. 528 of the report):

> I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred. I express

> no concluded view whether courts of inferior jurisdiction possess similar powers. But if they do and excercise them mistakenly, their error can be corrected by mandamus (see *Mills v. Cooper* [1967] 2 All ER 100, [1967] 2 QB 459).

Seen in that light, the prosecution of the three defendants had the full blessings of the public prosecutor and the criminal trial is now at an advanced stage. The plaintiff certainly has no control over the progress of the criminal trial as the prosecution was conducted by a different agency. Finally, to round it up Pape J in *Wonder Heat Pty v. Bishop (supra)* had this to say in that case (see p. 495 to p. 496 of the report):

> For myself, I am one of those who believe that if an accused person has in fact and in law a good defence, it loses nothing by being disclosed. But the right to advance at a criminal trial a surprise defence is merely part of the wider proposition that an accused person is not obliged to say anything in his defence unless he so desires. Mr. Shillito referred me to a decision of Weigall, A.J., in Re Haire, [1924] V.L.R. 65, in which the curator of the estates of deceased persons applied for an order revoking a grant of probate to the husband of the deceased. It appeared that there was evidence that the will of which probate had been granted was forged by the husband of the deceased, and that he was, with others, awaiting trial upon a charge of conspiracy in connexion with the matter. The actual decision turned upon the question whether in law the curator was entitled to apply for revocation, and his Honour dismissed the application because he held he was not. His Honour said, at page 68: 'But even if I have power now to accede to the curator's present application, the exercise of such power is to some extent discretionary, and in the exercise of my discretion I should, I think, decline to make at this stage any such order as is now sought. For reasons already indicated, it would be most undesirable to now make any order enabling civil litigation to proceed side by side and concurrently with the now pending proceedings in the criminal court. If this application should not be dismissed, it should at any rate be adjourned for a month or longer.' I think I should take the same course. The discretion I have in dealing with an application for an adjournment is a different discretion to that which I was asked to exercise when application was made for a stay. The considerations relevant to this application for an adjournment would not be relevant to an application for a stay for, to make them relevant to that application, I would be assigning a new basis of public policy to a rule based upon a different type of public policy. The public policy involved in the rule in *Smith v. Selwyn, supra*, is not that an accused person should not be required to incriminate himself. Mr. Coleman urged upon me that to decline a stay but to grant an adjournment was, in effect, to do the same thing, for whether it be called a stay or an adjournment, the effect was to delay the action until after the trial. But I do not think this is so. A stay would prevent any proceedings in the action at all, whereas, by adjourning the summons for final judgment, all proceedings

> are not brought to a standstill. There is no reason that I can see, for instance, why discovery of documents should not be obtained. Mr. Coleman also argued that the material before me was defective - he said that the affidavit of the clerk for the defendant's solicitor did not state that the defendant intended to plead not guilty on his trial, nor was it said that the defendant had a good defence to the action on the merits. It would, I think, have been preferable had these matters been specifically deposed to, but I think it is reasonably clear on a fair reading of the affidavit that the defendant intends to plead not guilty. It is stated that he did so in the lower court, and in paragraph 6 it is said that if the defendant is required to satisfy a judge in chambers that he has a good defence to the action on the merits, he will be forced to go into his defence on oath prior to his trial. This would be a most uncandid affidavit if the defendant intended to plead guilty on his trial. I have ascertained from the Crown law authorities that the defendant will be presented for trial on these charges early in March next.
>
> In these circumstances, I think I ought to adjourn the hearing of the summons for final judgment until that trial has been concluded.

The case of *Hunter v. Chief Constable of West Midlands and Another* [1981] 3 All ER 727 HL was a case of criminal proceedings that ended with a conviction and it was followed by the civil proceedings. In the criminal proceedings the accused alleged that he was assaulted by police officers to procure confession whilst in custody. The accused failed to prove the assault and he was convicted. The accused then proceeded by way of civil proceedings against the police claiming damages for assault by police officers. Lord Diplock held that "issue estoppel" had no place in the English criminal law. At p. 733 of the report, Lord Diplock said succinctly:

> Nevertheless it is my own view, which I understand is shared by all your Lordships, that it would be best, in order to avoid confusion, if the use of the description 'issue estoppel' in English law, at any rate (it does not appear to have been adopted in the United States), were restricted to that species of estoppel *per rem judicatam* that may arise in civil actions between the same parties or their privies, of which the characteristics are stated in a judgment of my own in *Mills v. Cooper* [1967] 2 All ER 100 at 104, [1967] 2 QB 459 at 468-469 that was adopted and approved by this *House in Director of Public Prosecutions v. Humphrys* [1976] 2 All ER 497, [1977] AC 1, the case in which it was also held that 'issue estoppel' had no place in English criminal law.

All these authorities serve as mere guidelines and, at the end of the day, it is for me to decide whether to allow encl. 77. In deciding whether a stay of civil proceedings should be granted until conclusion of criminal proceedings and where there are concurrent civil and criminal proceedings in respect of the same subject matter, this court having control of the civil proceedings

could, in the exercise of its discretion, stay those proceedings if it appears to the court that justice so requires having regard to the defendants' right of silence in relation to the concurrent criminal proceedings. An important factor to be taken into account by this court in deciding whether to grant a stay was whether there was a real and not merely a notional damage that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings. In my judgment, there was no impediment for the plaintiff to file the present civil suit while the criminal proceedings were in progress. The defendants' right of silence in the criminal proceedings remained intact and exercisable by them at the appropriate time. There was no miscarriage of justice nor prejudice on the part of the defendants when this court granted the stay of the civil proceedings. All the parties agreed that the burden of proof in a criminal trial differ from that of a civil suit. The documents produced during the criminal trial must be made available during the hearing of the present suit and the plaintiff certainly cannot produce those documents while the criminal trial was in progress. In so far as the criminal trial was concerned, the trial court at the Sessions level hold the reins and must ensure that the defendants be given a fair trial. It was within the realm of this court to control the civil suit and, on the balance of justice, I granted encl. 77, paras. (1) and (2) forthwith.